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E. ROBERT SEAVIER

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No. 70-295

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In the Supreme Court of the United States

OCTOBER TERM, 1971

FIRST NATIONAL CITY BANK, PETITIONER

v.

BANCO NACIONAL DE CUBA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,

Solicitor General,

Department of Justice,

Washington, D.C. 20530.

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This case involves a claim by Banco Nacional for excess collateral it had pledged with petitioner to secure a loan and a counterclaim by petitioner for that excess—conceded to be at least two million dollars—as an offset against the value of petitioner's property in Cuba expropriated by Cuba without compensation. The factual details and procedural history of the case are set forth in the two opinions of the court of appeals and the opinion of the district court, which are appended to the petition (see Pet. Apps. A, D and E).

Notwithstanding a letter stating the view of the Department of State¹ that important considerations of foreign policy should preclude application of the act of state doctrine to cases such as the present one, the court of appeals (Judge Hays dissenting) concluded that the doctrine applies. The decision thus raises important questions of interest to the United States concerning the roles of the Executive and Judicial Branches in the making of foreign policy.

1. In our view, the court of appeals' decision seriously impairs the power of the Executive over the control of foreign affairs both by rejecting the detailed and considered judgment of the Department of State that the foreign act of state rule should not govern this case and by narrowly limiting the *Bernstein* exception to that doctrine (*Bernstein v. N. V. Nederlandsche-Amerikaansche, etc.*, 210 F. 2d 375, 376 (C.A. 2)) (see Pet. App. A5-A9).

The fundamental consideration here concerns the responsibility of the Department of State to protect United States investments abroad. In the exercise of that significant responsibility, the Executive properly decided that the act of state doctrine—as a bar to decision of the case on the merits—should not be applicable

¹ On November 17, 1970, we provided the Court with a copy of this letter. See Memorandum submitted by the Solicitor General in *First National City Bank v. Banco Nacional, Cuba*, No. 846, O.T. 1970. On January 25, 1971, the Court granted certiorari, vacated the judgment and remanded the case to the court of appeals "for reconsideration in light of the views of the Department of State" as set forth in that letter. 400 U.S. 1019. The letter is appended to the petition (Pet. App. C).

to the present class of cases. By restricting the power of the Executive Branch to determine that the act of state doctrine should not apply in certain cases, the decision below restricts the capacity of the government to assist American investors in securing prompt, adequate and effective compensation for expropriation of American property abroad.

The principle of fairness which underlies the decision in *National City Bank v. Republic of China*, 348 U.S. 356, should be applicable in this case as well. In that case the Court held that a foreign sovereign suing in a federal court waives its immunity as regards counter-claims brought by the defendant. The Court pointed out that in such circumstances the foreign sovereign "wants our law, like any other litigant, but it wants our law free from the claims of justice" (348 U.S. at 361-362); it concluded that in such a setting "fair dealing" outweighs the traditional rule of sovereign immunity (*id.* at 365). So here, an instrumentality of the expropriating foreign sovereign² should not be permitted to institute a suit and be immune from setoffs and counterclaims.

3. Finally, we submit that nothing decided in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, calls for denial of the present petition. *Sabbatino* made clear that it was not "laying down or reaffirming an inflexible and all-encompassing rule." 376 U.S. at 428.

² As the district court pointed out, there "is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation" (Pet. App. E4).

Moreover, the Court expressly avoided passing on the validity of the *Bernstein* exception, and pointed out that there had been no expression of State Department policy on the litigation in *Sabbatino* (376 U.S. at 420). Here the Department has made its position explicit. Accordingly, the important issue posed here—the application of the act of state doctrine despite the firm view of the Executive that it should not be applied in these circumstances—was not decided in *Sabbatino*.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

